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8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA  
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11 RANDLE HESTER, ) Case No. CV 15-8880 JVS(JC)  
12 Petitioner, )  
13 v. ) ORDER TO SHOW CAUSE WHY  
14 J. SOTO, Warden, ) THIS ACTION SHOULD NOT BE  
15 Respondents. ) DISMISSED AS TIME-BARRED  
16

17 On November 6, 2015, petitioner signed and is deemed to have  
18 constructively filed<sup>1</sup> a Petition for Writ of Habeas Corpus by a Person in State  
19 Custody (“Petition”), which was formally filed on November 13, 2015. The  
20 Petition challenges petitioner’s October 2008 conviction in Orange County  
21 Superior Court as to which he was sentenced in February 2009. (Petition at 2).  
22 Petitioner raises a single claim – that the evidence was insufficient to support gang  
23 allegations. (Petition at 5).

24 Pursuant to 28 U.S.C. § 2244(d), a one-year statute of limitations applies to  
25 a petition for a writ of habeas corpus by a person in state custody. The limitation  
26 period runs from the latest of: (1) the date on which the judgment became final by  
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28 <sup>1</sup>See Houston v. Lack, 487 U.S. 266, 276, (1988).

1 the conclusion of direct review or the expiration of the time for seeking such  
 2 review; (2) the date on which the impediment to filing an application created by  
 3 State action in violation of the Constitution or laws of the United States is  
 4 removed, if the applicant was prevented from filing by such State action; (3) the  
 5 date on which the constitutional right asserted was initially recognized by the  
 6 Supreme Court, if the right has been newly recognized by the Supreme Court and  
 7 made retroactively applicable to cases on collateral review; or (4) the date on  
 8 which the factual predicate of the claim or claims presented could have been  
 9 discovered through the exercise of due diligence.

10 In this case, it appears that petitioner had one year from the date his  
 11 conviction became final to file a federal habeas petition. Petitioner's conviction  
 12 became final on May 17, 2011, *i.e.*, ninety (90) days after the California Supreme  
 13 Court denied his petition for review on February 16, 2011 (Petition at 3)<sup>2</sup> – when  
 14 petitioner's time to file a petition for certiorari with the United States Supreme  
 15 Court expired. See Bowen v. Roe, 188 F.3d 1157, 1158-59 (9th Cir. 1999) (period  
 16 of direct review in 28 U.S.C. § 2244(d)(1)(A) includes ninety-day period within  
 17 which petitioner can file petition for writ of certiorari in United States Supreme  
 18 Court, whether or not petitioner actually files such petition). Therefore, it appears  
 19 that the statute of limitations commenced to run on May 18, 2011, and absent  
 20 tolling, expired on May 17, 2012.

21 Title 28 U.S.C. § 2244(d)(2) provides that the “time during which a properly  
 22 filed application for State post-conviction or other collateral review with respect to  
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24 <sup>2</sup>Although the Petition reflects only that the California Supreme Court denied petitioner's  
 25 petition for review on an unspecified date in “2011,” the California Supreme Court docket for Case  
 26 No. S189454 – which corresponds to petitioner's petition for review, is publicly available via  
 27 <http://appellatecases.courtinfo.ca.gov>, and of which this Court takes judicial notice (see Fed. R. Evid.  
 28 201; Mir v. Little Company of Mary Hosp., 844 F.2d 646, 649 (9th Cir. 1988) (court may take  
 judicial notice of court records)) – reflects that the California Supreme Court denied petitioner's  
 petition for review on February 16, 2011.

1 the pertinent judgment or claim is pending shall not be counted toward” the one-  
 2 year statute of limitations period. Petitioner “bears the burden of proving that the  
 3 statute of limitations was tolled.” Banjo v. Ayers, 614 F.3d 964, 967 (9th Cir.  
 4 2010), cert. denied, 131 S. Ct. 3023 (2011). Here, the Petition does not reflect that  
 5 petitioner sought post-conviction or other collateral review in state court with  
 6 respect to the judgment in issue. (Petition at 3).<sup>3</sup> Accordingly, statutory tolling  
 7 does not render the Petition timely filed.

8 In addition to statutory tolling, the limitations period may also be subject to  
 9 equitable tolling if petitioner can demonstrate both that: (1) he has been pursuing  
 10 his rights diligently; and (2) some extraordinary circumstance stood in his way.  
 11 Holland v. Florida, 560 U.S. 631, 649 (2010). It is a petitioner’s burden to  
 12 demonstrate that he is entitled to equitable tolling. Miranda v. Castro, 292 F.3d  
 13 1063, 1065 (9th Cir.), cert. denied, 537 U.S. 1003 (2002). Here, it does not appear  
 14 from the face of the Petition and supporting documents that petitioner has met  
 15 such burden.

16 Finally, in rare and extraordinary cases, a plea of actual innocence can serve  
 17 as a gateway through which a petitioner may pass to overcome the statute of  
 18 limitations otherwise applicable to federal habeas petitions. McQuiggin v.  
 19 Perkins, 133 S. Ct. 1924, 1928 (2013); see also Lee v. Lampert, 653 F.3d 929,  
 20 934-37 (9th Cir. 2011) (en banc). “[A]ctual innocence’ means factual innocence,  
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 23 <sup>3</sup>The Court nonetheless notes that the California Supreme Court docket for Case No.  
 24 S200235 – of which the Court takes judicial notice – reflects that on February 21, 2012, petitioner  
 25 formally filed a petition for writ of habeas corpus in such court which was denied on June 13, 2012,  
 26 with citations to People v. Duvall, 9 Cal. 4th 464, 474 (1995), In re Waltreus, 62 Cal. 2d 218, 225  
 27 (1965), In re Dixon, 41 Cal. 2d 756, 759 (1953), In re Swain, 34 Cal. 2d 300, 304 (1949), and In re  
 28 Lindley, 29 Cal. 2d 709, 723 (1947). Even assuming such state petition challenged the judgment in  
 issue and the Court afforded statutory tolling during its pendency, or even that the statute of  
 limitations commenced to run upon its denial, this would not impact the outcome of this matter  
 because the instant federal Petition was filed more than three years after such state petition was  
 denied.

1 not mere legal insufficiency.” Bousley v. United States, 523 U.S. 614, 623 (1998);  
2 Calderon v. Thompson, 523 U.S. 538, 559 (1998); Muth v. Fondren, 676 F.3d 815,  
3 819, 822 (9th Cir.), cert. denied, 133 S. Ct. 292 (2012). “[A] petitioner does not  
4 meet the threshold requirement unless he [or she] persuades the district court that,  
5 in light of the new evidence, no juror, acting reasonably, would have voted to find  
6 him [or her] guilty beyond a reasonable doubt.” Perkins, 133 S. Ct. at 1928  
7 (quoting Schlup v. Delo, 513 U.S. 298, 329 (1995)). In order to make a credible  
8 claim of actual innocence, a petitioner must “support his allegations of  
9 constitutional error with new reliable evidence – whether it be exculpatory  
10 scientific evidence, trustworthy eyewitness accounts, or critical physical evidence  
11 – that was not presented at trial.” Schlup, 513 U.S. at 324; see also Griffin v.  
12 Johnson, 350 F.3d 956, 963 (9th Cir. 2003) (holding that “habeas petitioners may  
13 pass Schlup’s test by offering ‘newly presented’ evidence of actual innocence”),  
14 cert. denied, 541 U.S. 998 (2004); Shumway v. Payne, 223 F.3d 982, 990 (9th Cir.  
15 2000) (“[A] claim of actual innocence must be based on reliable evidence not  
16 presented at trial.”). The habeas court then “consider[s] all the evidence, old and  
17 new, incriminating and exculpatory, admissible at trial or not.” Lee, 653 F.3d at  
18 938 (internal quotations omitted; quoting House v. Bell, 547 U.S. 518, 538  
19 (2006)). On this record, the court “must make a ‘probabilistic determination about  
20 what reasonable, properly instructed jurors would do.’” House, 547 U.S. at 538  
21 (quoting Schlup, 513 U.S. at 329). Unexplained or unjustified delay in presenting  
22 new evidence is a “factor in determining whether actual innocence has been  
23 reliably shown.” Perkins, 133 S. Ct. at 1928, 1935; Schlup, 513 U.S. at 332 (“A  
24 court may consider how the timing of the submission and the likely credibility of a  
25 [petitioner’s] affiants bear on the probable reliability of . . . evidence [of actual  
26 innocence].”). Here, petitioner has not submitted new, reliable evidence to cast  
27 doubt on his conviction to permit the Court to consider his apparently otherwise  
28 time-barred claim.

1 For the reasons discussed above, based upon the Petition as currently  
2 submitted, 28 U.S.C. § 2244(d)(1) appears to bar this action. Petitioner is  
3 therefore ORDERED TO SHOW CAUSE within fourteen (14) days of the date of  
4 this Order, why this action should not be dismissed as time-barred. Petitioner is  
5 advised that he has the right to submit declarations, affidavits, or any other  
6 relevant evidentiary materials with his response to this Order to Show Cause. All  
7 affidavits and declarations must be signed under penalty of perjury by persons  
8 having personal knowledge of the facts stated in the affidavits or declarations.

9 Instead of filing a response to the instant Order to Show Cause, petitioner  
10 may request a voluntary dismissal of this action pursuant to Federal Rule of Civil  
11 Procedure 41(a). If he elects to proceed in that manner, he may sign and return the  
12 attached Notice of Dismissal. However, petitioner is advised that any dismissed  
13 claim may later be subject to dismissal as time-barred under 28 U.S.C.  
14 § 2244(d)(1).

15 **Petitioner is cautioned that the failure timely to respond to this Order**  
16 **to Show Cause may result in the dismissal of this action with prejudice based**  
17 **upon petitioner's claim being time-barred, petitioner's failure to comply with**  
18 **the Court's order, and/or petitioner's failure to prosecute.**

19 IT IS SO ORDERED.

20 DATED: November 16, 2015

21  
22 /s/

23 Honorable Jacqueline Chooljian  
24 UNITED STATES MAGISTRATE JUDGE  
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